In the
United States Court of Appeals
For the Seventh Circuit

No. 00-2766

MICHAEL FLANAGAN, et al.,

Plaintiffs-Appellants,

v.

JOHN ASHCROFT, Attorney General
of the United States, and
DRUG ENFORCEMENT AGENCY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 2083—**Elaine E. Bucklo**, *Judge.*

ARGUED MAY 23, 2002—DECIDED JANUARY 21, 2003

Before FLAUM, *Chief Judge*, and BAUER and ROVNER, *Circuit Judges.*

ROVNER, *Circuit Judge.* After receiving a complaint that an instructor at its Chicago-based Basic Narcotics Training School used offensive language while conducting a seminar in the fall of 1994, the Drug Enforcement Agency began an investigation that eventually expanded to include five DEA agents who worked as seminar instructors: Michael Flanagan, Norbert Kuksta, Melvin Schabilion, Saul Weinstein, and Francis White. White resigned in the face of a proposal that he be terminated; the other agents were transferred to different cities. All five agents then

filed suit under Title VII charging that the DEA "mishandled" the investigation because they are white, male, and, in Weinstein's case, Jewish, and that the transfers, proposed dismissal, and other employment decisions were acts of retaliation for their opposition to unlawful employment discrimination. The district court dismissed the discrimination count and granted summary judgment for the DEA on the retaliation count, and the agents appeal.

As the basis for their discrimination claim, the agents alleged that the DEA's conduct of its investigation was "egregious" and "unprofessional," that the DEA treated the agents and other witnesses in a "hostile and accusatory manner" and in such a way as to "give credence to false accusations" and to cause the circulation among the Chicago law enforcement community of "untrue rumors concerning [the agents'] professional competence and alleged misconduct," and that the botched investigation resulted in a "sexually charged, racially charged, hostile and offensive working environment." The district court, thinking these allegations similar to those in *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996), dismissed the discrimination count for failure to state a claim upon which relief may be granted. The plaintiffs in *McDonnell* were HUD employees who were accused by an anonymous complainant of engaging in job-related sexual misconduct. *Id.* at 257. HUD initiated an investigation during which, according to the plaintiffs, investigators interviewed witnesses in a "hostile and unprofessional manner" and indicated "their personal belief that the plaintiffs were guilty of the charges," thereby "g[iving] rise to even more lurid rumors" that "made the plaintiffs pariahs" among their co-workers. *Id.* at 257-58. We affirmed the dismissal of the *McDonnell* complaint, holding that "an investigation of sexual harassment that exceeds the proper limits is [not] itself a form of actionable sexual harassment." *Id.* at 260-61. Permitting discrimination claims based on such inves-

tigations, we explained, would "place[ ] employer[s] on a razor's edge": ignore complaints of sexual harassment and face Title VII liability if the complaints are meritorious, or investigate them thoroughly and face discrimination claims from the targeted employees. *Id.* at 261; *see also, e.g.*, *Malik v. Carrier Corp.*, 202 F.3d 97 (2d Cir. 2000) (relying on similar reasoning to hold that claim for negligent infliction of emotional distress may not be premised on an employer's sexual harassment investigation). We agree with the district court's conclusion that this case is on all fours with *McDonnell*; indeed, the allegations are nearly identical. The agents argue that their case is different because *any* investigation into their conduct would have been unwarranted; the very decision to investigate the complaint, they insist, is evidence of harassment. We see no important distinction, however, between a decision to investigate and the extent of an investigation. Moreover, the agents' suggestion that an employer is not *entitled* to investigate a sexual harassment complaint is untenable, *see, e.g.*, *Malik*, 202 F.3d at 105 ("[A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer."); *McDonnell*, 84 F.3d at 260 ("Employers who disregard charges of sex-related misconduct by their employees run a considerable risk of being sanctioned for having tolerated sexual harassment."), and in any event, as the language we quoted above makes clear, this was not the crux of the agents' complaint.

The district court granted summary judgment to the DEA on the retaliation count because the DEA introduced evidence showing that all employment actions taken against the agents were based solely on the original complaint, the ensuing investigation (in which the DEA found that each of the agents had engaged in miscon-

duct), and on a harassment suit filed against the agents by female seminar attendees and the attendant negative publicity. *See, e.g., Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640, 644 (7th Cir.) ("If the defendant presents unrebutted evidence of a noninvidious reason for the adverse action, he is entitled to summary judgment."), *cert. denied*, 123 S. Ct. 79 (2002). In their brief the agents assert that the district court ignored evidence showing that the DEA's explanation was pretextual, but they point specifically only to an unsworn document they call "the invidious list," which details instances in which the DEA purportedly favored minority and female employees. Because the agents' counsel disclaimed any reliance on the list as evidence of pretext at oral argument, we do not address it.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

In the United States District Court
Northern District of Illinois
Eastern Division

Flanagan, et al. JUDGMENT IN A CIVIL CASE

v. Case Number: 97 C 2083

Reno, et al.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the Defendants' motion for summary judgment is granted and the case terminated. Judgment is, therefore, entered in favor of defendants and against plaintiffs.

Michael W. Dobbins, Clerk of the Court

/s/ Matthew P. John
Matthew P. John, Deputy Clerk

Date: 6/14/2000

In the United States District Court
Northern District of Illinois

Case Number: 97 C 2083 Date: June 2, 1998

Name of Assigned Judge: Elaine E. Bucklo

Case Title: Flanagan, et al. vs. Reno, et al.

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DOCKET ENTRY:

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- Status hearing set for 6/26/98 at 9:45 A.M.

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- [Other docket entry] Defendants' motions to dismiss (25-1, 27-1) and their motion to strike are granted in part and denied in part. Enter Memorandum Opinion and Order.

- [For further detail see order attached to the original minute order.]

* * * * *

In the United States District Court for the Northern District of Illinois Eastern Division

MICHAEL FLANAGAN, NORBERT KUKSTA, MELVIN SHCBILION, SAUL WEINSTEIN, and FRANCIS E. WHITE, Plaintiffs,	)	
v.	)	
	)	No. 97 C 2083
JANET RENO, Attorney General of the United States, and DRUG ENFORCEMENT AGENCY, Defendants.	)	

MEMORANDUM OPINION AND ORDER

On August 20, 1997, the plaintiffs filed a four-count amended complaint against the defendants. In Counts I and II, they allege that Janet Reno, Attorney General of the United States, in her official capacity, discriminated and retaliated against them in violation of Title VII, 42 U.S.C. § 2000e *et seq.* In Count IV, they allege that the Drug Enforcement Administration ("DEA") violated their right to privacy as protected by the Privacy Act, 5 U.S.C. § 552a. The plaintiffs voluntarily dismissed Court III

against the individual defendants.[1] The two remaining defendants, the Attorney General and the DEA, move to dismiss the other three counts and to strike certain remedies. For the reasons set forth below, the defendants' motions are granted in part and denied in part.

Background

The plaintiffs, Michael Flanagan, Norbert Kuksta, Melvin Schabilion, Saul Weinstein and Francis E. White, were at all relevant times special agents of the DEA in the Chicago, Illinois Field Division. All plaintiffs are Caucasian males. Mr. Weinstein is also Jewish.

The plaintiffs allege the following facts. In or about September, 1994, a female student who attended the DEA Basic Narcotics Training School wrote a letter to Kenneth Cloud, Special Agent-In-Charge in Chicago, reporting that she had become offended by some language that was used during the course of Mr. Schabilion's training sessions. As a result of the letter, the Chicago Field Office conducted an investigation of Mr. Schabilion. Upon review of the investigation and its findings, Mr. Cloud gave Mr. Schabilion a Letter of Reprimand for improper conduct and forwarded the letter to DEA Headquarters for approval. The report and proposed disciplinary action were rejected and a full investigation was opened. Subsequently, Mr. Flanagan, Mr. Kuksta, Mr. Weinstein and Mr. White became targets of the investigation as well.

Count I alleges that the plaintiffs were discriminated against and harassed based on their sex, male, and their race, Caucasian. Mr. Weinstein further claims that he

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[1] The individual defendants, Thomas A. Constantine, Stephen Greene, Armando Marin and Steven Casteel, are deleted from the case caption.

was discriminated against because he is Jewish. Plaintiffs allege that they were singled out for a disparate and biased disciplinary investigation and ultimate discipline. Count II alleges that DEA management launched its investigation against the plaintiffs in retaliation for objecting to discrimination and for assisting other DEA employees with their discrimination claims. DEA management is alleged to have transferred plaintiffs for the Chicago Field Office and to have taken away their badges, guns and credentials. Count IV alleges that the DEA violated the plaintiffs' rights under the Privacy Act.

Motion to Dismiss

The defendant initially seek to dismiss Counts I, II, and IV for failure to exhaust administrative remedies. The plaintiffs, however, have alleged that they exhausted their remedies. Consequently, I do not dismiss the counts on this ground.

A. Count I: Discrimination

In *McDonnell v. Cisneros*, 84 F.3d 256, 257 (7th Cir. 1996), the Secretary of Housing and Urban Development ("HUD") received two anonymous letters accusing the plaintiffs, HUD's Regional Inspector General ("IG") for Investigations and Assistant Regional IG, of lurid job-related sexual misconduct. Because the plaintiffs were employed in the IG's office, which would normally investigate such charges, the Secretary retained Defense Department investigators. *Id.* The investigator "interviewed the plaintiffs and other employees of the [IG's] office in a hostile and unprofessional manner, indicating t the persons they interviewed their personal belief that the plaintiffs were guilty of the charges made in the anonymous letters." *Id.* at 258. They further conducted their investigation in

such manner as to "g[ive] rise to even more lurid rumors, widely circulated within HUD." *Id.* Both plaintiffs were eventually exonerated and filed complaints that the treatment they received during the investigation constituted sexual harassment under Title VII. *Id.*

The Seventh Circuit addressed the question of "whether an investigation of sexual harassment that exceeds the proper limits is itself a form of actionable sexual harassment." *Id.* at 260. The court found that no such cause of action existed for two reasons, one practical and one doctrinal. *Id.* at 261. "The practical objection is that it places the employer on a razor's edge." *Id.* The employer would be liable for failing to investigate allegations of sexual harassment and liable for vigorously investigating such charges. *Id.*

The doctrinal objection revolved around Congress's specific provision with respect to the legal remedies of victims of improper investigations by federal officers. *Id.* If the investigators had told the people who they were interviewing that the plaintiffs had engaged in job-related sexual misconduct, which statements were allegedly false and defamatory, the investigators could have been guilty of defamation. *Id.* The investigators would have a defense of qualified immunity but the plaintiffs could substitute the United States as a defendant under the Federal Tort Claims Act ("FTCA"), as amended by the Westfall Act. *Id.* The United States, however, is not liable under the FTCA for defamation by its employees. *Id.* The court concluded that to allow the plaintiffs' Title VII claim would be to inappropriately amend the FTCA and circumvent the Westfall Act by allowing a defamation claim. *Id.*

Under *McDonnell*, the plaintiffs cannot bring a harassment claim based on the DEA's improper conduct during its investigation into alleged misconduct. The plaintiffs

contend, however, that their case can be distinguished from *McDonnell* because they have alleged discrimination on the basis of their gender or religion. The rationale for *McDonnell*, however, extends to discrimination claims. An employer is still placed on a "razor's edge." It if fails to investigate alleged discrimination, it may be liable under Title VII. But if it investigates discrimination, the alleged perpetrator may claim that the employer investigated the allegations against him too vigorously as compared to other similarly situated employees.

In the alternative, the plaintiffs claim that unlike *McDonnell*, where the plaintiffs alleged improper conduct during a warranted and proper investigation into sexual harassment, they allege that the entire DEA investigation was unwarranted and motivated by unlawful bias. *McDonnell*, however, did involve allegations of groundless charges of misconduct. 84 F.3d at 259. The plaintiffs alleged that the anonymous letters were the work of a disgruntled employee. *Id.* at 257. Despite that fact, the Seventh Circuit still found that HUD had to investigate and that there was no claim for harassment based on the investigation.

> Although the complaint was anonymous, the plaintiffs do not argue that their employer was obligated or evenentitled to ignore it. Employers who disregard charges of sex-related misconduct by their employees run a considerable risk of being sanctioned for having tolerated sexual harassment. It behooved HUD to investigate the charges against the plaintiffs . . .

McDonnell, 84 F.3d at 260. Consequently, the plaintiffs' discrimination claim falls under the *McDonnell* holding and Count I is dismissed.

B. Count II: Retaliation

The plaintiffs bring two retaliation claims. First, they contend that the investigation was in retaliation for objecting to discrimination and for assisting other employees with their discrimination claims. The defendants argue that this claim should be dismissed under the *McDonnell* rationale. *McDonnell*, however, recognized that retaliation is independent of discrimination and harassment. *Id.* at 258 ("The two types of claims, harassment (or other employment discrimination) and retaliation for complaining about or opposing the harassment, are independent."). Even though the plaintiffs cannot bring a claim of harassment or discrimination based on the DEA's conduct during the investigation, they can bring a claim of retaliation.

Second, the plaintiffs allege that the defendants retaliated against them for filing formal charges of discrimination. The defendants claim that the alleged retaliatory conduct is the same conduct which is the basis of the plaintiffs' discrimination claim. *McDonnell* dismissed a retaliation claim where [t]he allegedly retaliatory conduct was merely the continuation of the conduct giving rise to the [harassment] complaints. . . . In other words, nothing changed when [the plaintiff] filed her [harassment] complaints. There was no ratcheting up of the harassment. Therefore the complaints could not have been the cause of the ostracism, disdain, and ridicule of which she complains in the retaliation count.

McDonnell, 84 F.3d at 259.

An analysis of Count II, however, indicates that the plaintiffs alleged conduct other than improper investigation. For example, Mr. Flanagan, Mr. Kuksta, Mr. Schabilion, and Mr. Weinstein all alleged that they were transferred from the Chicago Field Office in retaliation for filing their complaint. Mr. White alleged that DEA manage-

ment took away his badge, gun, and credentials. These allegations demonstrate that DEA management "ratcheted up" the discrimination and harassment such that it constituted retaliation. Thus, I do not dismiss Count II.

C. Count IV: Privacy Act

The defendants argue that this claim is merely a restatement of the Title VII claim and thus should be dismissed under *McDonnell*. In the alternative, the defendants contend that Count IV is preempted by Title VII because it provides the exclusive remedy for claims of discrimination in employment. It relies on the Supreme Court's decision in *Brown v. General Servs. Admin.*, 425 U.S. 820 (1976). In that case, the Supreme Court stated that Title VII provided the exclusive remedy for federal employment discrimination and thus the plaintiff could not seek other judicial remedies for his time-barred Title VII racial discrimination claim. *Id.* at 829.

The plaintiffs allege that the DEA's conduct in investigation the charges was discriminatory and that the DEA disclosed private information in violation of the Privacy Act. These are two separate claims—a privacy violation is not necessarily discriminatory. Furthermore, *Brown* does not preclude a privacy claim. *Brown* merely held that federal employment discrimination claims had to be brought under Title VII. *Id.* It did not hold that conduct underlying a Title VII claim could not also violate other federal statutes. In fact, Privacy Act claims and Title VII claims have been brought together. *See Germane v. Heckler*, 804 F.2d 366 (7th Cir. 1986).

This does not end the inquiry. The plaintiffs' privacy action is still limited. They cannot bring claims for violations of 5 U.S.C. § 552a(e)(1), (2), and (5) because the DEA is exempt from the requirements of those sections.

See 28 C.F.R. §§ 16.98, 16.102. Furthermore, where the DEA is not exempt,[2] some, if not all, of the violations may be barred by the statute of limitations. The plaintiffs filed their initial complaint on March 26, 1997. In their amended complaint, they allege that in or about January, 1995 and continuing thereafter, the DEA violated plaintiffs' rights under the Privacy Act. The Act, however, has a two-year statute of limitations. 5 U.S.C. § 552a(g)(5). Consequently, I will only consider any violations that occurred on or after March 27, 1995.[3]

Motion to Strike Remedies

The defendants move to strike two remedies sought by the plaintiffs. First, the plaintiffs seek to have the Department of Justice ("DOJ") defend them or subsidize their defense in *Markham v. White,* 95 C 2065 (N.D. Ill. filed

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[2] The plaintiffs also allege violations of 5 U.S.C. §§ 552a(b) and 552(e)(6).

[3] The defendants argue that to the extent that the privacy claims are not barred, the plaintiffs are not entitled to a jury trial on those claims. The plaintiffs did not respond to this argument. However,

> [i]t has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government . . . [I]f Congress waives the Government's immunity from suit, . . . the plaintiff has a right to a trial by jury only where the right is one of "the terms of [the Government's] consent to be sued." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). Congress must "affirmatively and unambiguously" grant that right. *Id.* at 168. Since the Privacy Act is silent with respect to the availability of jury trials, the plaintiffs do not have a right to a jury on those claims.

April 5, 1995). If the plaintiffs are being sued in their official capacities, DOJ is required to defend them. If they are being sued in their individual capacities, the decision by DOJ not to defend them is discretionary and unreviewable. *Falkowski v. EEOC*, 764 F.2d 907, 910-11 (D.C. Cir. 1985).

Second, the plaintiffs seek to enjoin the DEA and other federal agencies from making public statements referring to information contained in any records maintained by the DEA or any other federal agency. The plaintiffs cannot enjoin an agency that is not a party to this suit. They also cannot obtain the requested relief for violation of the Privacy Act. 5 U.S.C. § 552a(g)(4) only provides for actual damages and costs, including attorney's fees, for the violations alleged in this case. This does not mean, however, that the plaintiffs are not entitled to this relief under Title VII. *See* 42 U.S.C. § 2000e-5(g)(1) (allowing "any other equitable relief as the court deems appropriate").

Conclusion

For the reasons stated above, the defendants' motion to dismiss and motion to strike are granted in part and denied in part.

ENTER ORDER:

/s/ Elaine L. Bucklo
Elaine E. Bucklo
United States District Judge

Dated: June 2, 1998

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In the United States District Court
Northern District of Illinois

Case Number: 97 C 2083 Date: June 14, 2000

Name of Assigned Judge: Elaine B. Bucklo

Case Title: Flanagan, et al. vs Reno, et al.

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DOCKET ENTRY:

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■ [Other docket entry] Defendants' motion for summary judgment is granted. Ruling set for 6/23/00 is vacated. Any pending motion in this case is terminated as moot. Enter Memorandum Opinion and Order.

■ [For further detail see order attached to the original minute order.]

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In the United States District Court for the Northern District of Illinois Eastern Division

MICHAEL FLANAGAN, NORBERT KUKSTA, MELVIN SHCBILION, SAUL WEINSTEIN, and FRANCIS E. WHITE, Plaintiffs,	)	
v.	)	No. 97 C 2083
JANET RENO, Attorney General of the United States, and DRUG ENFORCEMENT AGENCY, Defendants.	)	

MEMORANDUM OPINION AND ORDER

The plaintiffs here claim that they were subject to retaliation for complaining that they were white male victims of political correctness. They are present and former federal drug agents (the "DEA agents"), originally based in the Chicago, Illinois, office of the Drug Enforcement Agency ("DEA"), who gave DEA-sponsored training seminars in drug enforcement in the early 1990s. Three women police officer participants in these seminars filed a highly publicized lawsuit, alleging that the DEA agents engaged in sexual harassment during these sessions, that put the agency in an unflattering light. The DEA agents were put on leave, transferred, and subjected to various other actions to which they objected. They filed administra-

tive compliants, alleging that the DEA's investigation of the charges was discriminatory against them as white men, that women or minorities who had behaved as they did would not have been treated as they were treated. In the present lawsuit, they allege that the job actions to which they were subjected were really retaliation for filing these complaints. The defendants move for summary judgment, and I grant the motion.

I.

The plaintiffs are or were "well-regarded and highly decorated federal drug agents." In the early 1990s, they participated in an "incredibly successful" DEA training program for military and local enforcement agents to help those officers understand the dangers involved in drug enforcement and teach them how to gather evidence in drug cases. The DEA agents gave or supervised a number of such training seminars from 1989 to 1995. On April 5, 1995, three women police officers from Madison, Wisconsin, who had participated in their seminars, filed a lawsuit, in which they alleged, among other things, that from 1991 to 1995 the DEA agents:

> (1) gave presentations that were "riddled with talk . . . that glorified aggressive sexual acts by men against women, intermixed with comments glorifying violence and demeaning women in general";
>
> (2) opened each seminar by promising male participants that "[w]hen you men get home you are going to fuck like you've never fucked before. Tell your wife to wear something cheap or nothing at all because you are just going to rip it off. Get the kids out of the house 'cause it's gonna be a brutal fucking assault";

(3) interspersed instructional slides with slides of nude or scantily clad nude females, referred to women in attendance as "hen," "babe," "little girl"; to other women as "bitches"; to black women as "brown sugar"; to Attorney General Janet Reno as "a fuckin' dyke" and a "bitch"; and fantasized out loud about Attorney General Reno and First Lady Hillary Rodham Clinton "getting together and doing other";

(4) described the objective of drug surveillance as "get [ting] laid," "get [ting] her drunk and find[ing] a hotel";

(5) boasted about how DEA agents get "horny" unless they can kill people on a regular basis; about having shot one person 16 times; discussed how the human head looks when hit with a rifle round; talked about how blowing up explosives "will give you a chubby" [an erection], and about making sure that a suspect weighed "ten pounds more" after being shot;

(6) grabbed their own genitals for emphasis, referring to them as "chubby," "woody," "johnson," "pecker," "dick," "rocks";

(7) directed sexual comments to specific women participants, one of them saying, e.g., to a women lying down on a firing range, "I'm getting a hard on!", then grabbing his genitals; inviting a women onstage for a chemical demonstration because "it was more interesting watching a pretty girl"; made reference to her "jiggling" while having her turn sideways so that her breasts could more clearly seen; telling a participant to "put your hot little hands on the bag [used in the demonstration]. Give it a good squeeze, you'll get it going."

Complaint in *Markham v. White*, No. 95 C. 2065, at 3-6 (filed in N.D. Ill. Apr. 5, 1995). The DEA agents admit that they may have been "politically 'incorrect [ ].'" They say, however, that "drug enforcement habitually overshadows any notion of being politically 'correct'. . . . Salty language and four letter words often compromise the essential *sine qua non,* necessary to controlling the dangerous situations encountered while enforcing drug laws." They claim that there is a tension between "political 'correctness' and the desire to assist in the saving of the lives of those thousands of dedicated men and women who hope to stem the flow of dangerous drugs. . . ." the DEA agents do not, however, contend that giving training seminars to law enforcement officers is one of the dangerous situations that might justify or excuse "salty language."

Complaints were made about the seminars in 1994 even before the filing of the *Markham* lawsuit, leading to an internal investigation. Weinstein made an informal charge about the fact of the investigation because he was a white male, no later than mid-March 1995, although the exact date is unclear. There is no evidence that the other DEA agents took protected action before April 1995.

The *Markham* lawsuit created public embarrassment for the DEA. Madison, Wisconsin, TV news reported the allegations on the evening news on April 4, 1995. The AP wire service brought the allegations to the attention of the national media on April 5. On April 6, stories appeared in the *BNA Daily Labor Report*, the *Chicago Sun-Times*, the *Madison state Journal* and *Capital Times*, and as far away as Lakeland, Florida. The women officers' charges were recounted in lurid detail in most of the stories.[1] Virtually all of the most shocking and graphic

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[1] Moreover, *U.S. News and World Report* planned to publish an article discussing the DEA agent's language and conduct in its

(continued...)

language and conduct was quoted and described in *extenso.* On April 7, 1995, the DEA agents were placed on administrative leave with pay by Retha M. Fulmore, DEA Deputy Assistant Administrator of Personnel, at the recommendation of then Deputy Assistant administrator Thomas Byrne. There is debate about whether then DEA Administrator Thomas Constantine was involved in this decision or others connected with the affair. The DEA agents were required to hand over their guns, badges, and credentials while on leave.

On April 10, 1995, DEA Deputy Administrator Stephen Greene decided that four of the DEA agents should be transferred out of Chicago: Melvin Shabilion to Atlanta, Georgia; Saul Weinstein to Newark, New Jersey; Norbert Kuksta to St. Louis, Missouri; and Michael Flanagan to McAllen, Texas. Greene denied that the transfers were disciplinary. He testified that they made for "the good of the individuals involved and the good of the agency"; the DEA agents dispute this. The DEA agents were given 45 days to report to their new duty stations instead of the usual or former 90 days. They filed their first series of official complaints on April 11, 1995, following these up with further complaints on May 8 or 9, and then more complaints in late May and June.

As a result of the DEA's initial investigation into the police officers' charges, the agency proposed to terminate Francis White at Green's recommendation, but no final decision was reached before Agent White retired on May 1, 1995. Agent White claims that he was constructively discharged, as does Agent Weinstein, who resigned from the DEA in October 1995. Agent Flanagan received a letter

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[1] (...continued)
issue of June 5, 1995, and interviewed DEA officials about the allegations.

of reprimand, and he claims he failed to receive certain promotions, including one to the Brownsville, Texas, Resident Office, because of his protected activity. Some of the other DEA agents have other incidental complaints as well. This lawsuit followed.

II.

The standards for summary judgment are well known and need not be recited here. To make out an indirect case for illegal retaliation, the plaintiffs must show that (1) they engaged in activity protected under Title VII, (2) they suffered adverse employment action; and (3) a casual connection exists between the adverse action and their participation in the protected activity. *Koelsch v. Beltone Electronics Corp.*, 46 F.3d 705, 708 (7th Cir. 1995). If this *prima facie* case is made out, defendant employers must rebut with a showing that they acted from nondiscriminatory reasons, which the Plaintiffs can defeat by producing evidence that the proffered reasons were pretextual. *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 983 (7th Cir. 1999).

Here, the defendants do not dispute that the DEA agents engaged in protected action in filing the complaints. They do argue that the DEA agents did not suffer adverse employment action. An adverse actions occurs when an employee is fired or demoted, suffers a decrease in benefits or pay, or is given a significantly lesser job. *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996). Not every unwelcome employment action qualifies as an adverse action: negative reviews, a change in job title, an increased distance to travel to work, or a lateral transfer do not, by themselves, qualify. *Id.* The DEA agents do not adequately respond to the defendants' arguments that being placed on administrative leave with pay is not adverse

enough. They merely assert that this is adverse action. The argument is therefore waived.[2] *Koelsch*, 46 F.3d at 708.

Whether or not being placed on administrative leave is adverse action, the DEA agents also argue that transfers to far flung places constitute adverse action. I understand the Seventh Circuit's admonition that mere "lateral transfers" are not adverse action to apply within a reasonably compact geographical location. The case on which the *Koelsch* court relies for that proposition, *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir. 1989), concerned travel within a single school district, see *Id.* at 885. Being uprooted from one's community in Chicago and dispatched on 45 days notice many hundreds of miles away to Newark, McAllen, Atlanta, or St. Louis, whatever the charms or advantages of those communities, is not a "lateral transfer." In the circumstances, it is adverse employment action.

The defendants argue that it would have been adverse action actually to have terminated Agent White, but that he was not disciplined at all because he resigned. Fair enough, but their answer to his claim that he was constructively terminated is that he must show that the defendants made his workplace intolerable. *Drake v. Minnesota Mining & Manufacturing*, 134 F.3d 878, 886 (7th Cir. 1998), and that a complaining employee is ordinarily expected to stay and fight. *Id.* However, since the employee's termination was actually proposed, Agent White's is not the ordinary case, and a reasonable jury might believe that his workplace had become so intolerable that a reasonable person would have to quit.

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[2] A long term administrative leave, which would deprive an employee of work, any chance to advance, and other benefits, probably could constitute adverse employment action. It is less clear at what point this would become an adverse action.

According to the defendants, Agent Flanagan's reprimand was not adverse action because counseling letters or negative evaluations have been held not to be such action. But the reprimand was not a counseling letter or a mere negative evaluation. The DEA admits that it was disciplinary in nature, and if that is not adverse, what is? Agent Flanagan fails to make out a plausible case, however, that he was denied any promotions or transfers that he applied for, or indeed to offer any evidence, even his own sworn testimony, that he actually applied for any promotions or transfers after he was posted to McAllen. The DEA agents' other allegations of adverse job action are frivolous.

The DEA agents' causation argument is based on the principle that a "telling temporal sequence" is enough for a causal connection. *Davidson v. Midelforth Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998). First, they contend that on March 27, 1995, then DEA Administrator Constantine was "personally informed that the five Plaintiffs had file informal . . . complaints," and they were placed on administrative leave less than three weeks later. But the evidence they cite, DEA Agent James Morgan's affidavit, supports only the claim that Constantine had not been advised of Agent Weinstein's informal discrimination charges. It specifically states that Constantine had not been advised of Agent White's informal charges, and it says nothing about the others. Moreover, the DEA agents bring forward no evidence contradicting the defendants' sworn testimony that Constantine had nothing to do with the challenged decisions. Finally, as explained, the DEA agents do not show that administrative leave as such is adverse action, so there would be nothing in the temporal sequence to connect to Constantine's knowledge of Agent Weinstein's complaint.

Second, the DEA agents who transferred testify that they were transferred "within hours" of notifying an agency

EEO Counselor on April 10, 1995, that they intended to file formal charges. There is dispute about whether Constantine was involved in this decision, and the DEA agents' claim that he was involved rests on hearsay, but his involvement is not necessary for the causation argument. Because the transfers are adverse action in this context, the temporal sequence is established, and the causation element is satisfied for the transferred DEA agents.

The real issue in the case is whether the defendants' proffered reason for the transfers and other adverse action was legitimate or pretextual. It would not be retaliatory or otherwise illegal to transfer, reprimand, and even fire employees who had embarrassed the agency in the manner described. Indeed, if the agency had determined that the Madison policewomen's charges were true, the DEA arguably should have been disciplined regardless of whether the agency was publicly embarrassed. So the DEA agents must bring forward enough evidence to persuade a rational jury that the proffered reason is pretextual. Pretext means more than a mistake on the part of the employer; pretext means a lie, specifically a phony reason for some action. *Wolf v. Buss (America), Inc.*, 77 F.3d 914, 919 (7th Cir. 1996). A plaintiff can prove the incredibility of the employer's proffered reasons, and thereby demonstrate pretext, by showing that the employer's proffered reasons are (1) factually baseless, (2) not the actual motivation for the discharge, or (3) insufficient to motivate the adverse action. *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1130 (7th Cir. 1997).

The DEA agents make no effort to show that the reason was factually baseless—they admit that they behaved "politically incorrectly," leading to a lawsuit and public embarrassment for the agency. They do not deny that this would be sufficient to motivate transfers, reprimands,

or even termination. They rest their case on the argument that the proffered reason was not the actual reason. Although the DEA agents sat that "suggestions to the contrary border somewhere between the absurd and (the) inane," they do not begin to show this.

The DEA agents assert, with no evidentiary support, that they were treated differently, but they do not even say from whom or how. They say that the timing of the transfers is "suspicious," but they were transferred the day after the DEA was depicted as a serial sexual harasser in the national media due their behavior.

The DEA agents say that the image problems had been "forestalled" by placing them on administrative leave; but even if so, that is not a reason to doubt that they were transferred because of the embarrassment they had caused. They claim that it is "suspicious" that the posts were far apart and located inconveniently far from Chicago, where the *Markham* lawsuit is pending, but it is not surprising that posts available on short notice would be widely dispersed. They argue that it is "fishy" that the government refused to defend the civil case against them, but that is irrelevant to the motivation for the adverse job actions. Finally, the DEA agents allege that various problems arose with the transfers, *e.g.*, that there was no post in Newark for Agent Weinstein and that McAllen was bad for Agent Flanagan's children, but problems arise with any transfer. This does not bear on whether the DEA transferred them because of their embarrassing behavior.

An employer has the right to discipline employees that disgrace it with shameful and, if the women officers' allegations can be proved, quite possibly illegal conduct. Exercise of that right is not retaliation. The DEA agents fail to satisfy their burden that the defendants acted for other than the entirely legitimate reasons stated. The

defendants' motion for summary judgment is therefore Granted, terminating this case.

ENTER ORDER:

/s/ Elaine E. Bucklo
Elaine E. Bucklo
United States District Judge

Dated: June 13, 2000

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